DISCHARGEABILITY OF CHILD SUPPORT

HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

DISCHARGEABILITY OF CHILD SUPPORT

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DISCHARGEABILITY OF CHILD SUPPORT

WEDNESDAY, JUNE 13, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, at 9:30 a.m., in room 2226, of the Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee), presiding.

Present: Representatives Edwards, Drinan, Matsui, Hyde, and Sensenbrenner.

Staff present: Charles F. Vihon, bankruptcy consultant, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

This morning we are considering one of a number of issues that have arisen since the new bankruptcy code, Public Law 95–598, became law in 1978. Our subject today is the dischargeability of child support obligations.

This involves a natural conflict between bankruptcy policy and the policy behind the administration of the social security system, particularly the aid to families with dependent children. The issue does not involve any private group seeking some special advantage. It does involve the Congress more carefully weighing the policy of bankruptcy law to provide debtors with a fresh start and the equally compelling policy of AFDC to properly provide for some of our citizens.

We are fortunate today to have two expert witnesses who will provide us with the Federal-local perspective, and then they will sit as a panel to answer our questions.

Our first witness will be Louis B. Hays, Deputy Director, Office of Child Support Enforcement of the Social Security Administration. And then, before we hear from Mr. Hays, I take great pleasure in yielding to our distinguished colleague from California, the Honorable Robert Matsui, the author of this pending legislation. And Mr. Matsui will introduce our other witness. Mr. Matsui.

Mr. MATSUI. Thank you, Mr. Chairman.

Mr. HAYS. I do have a statement, and what I will do in order to shorten the time is to submit the statement for the record, if I may.

Mr. EDWARDS. Without objection, it will be accepted.

Mr. MATSUI. Thank you, and I would like to thank the chairman and the subcommittee staff for expediting this hearing and providing the forum for these two bills.

I would like to introduce, who will testify in a few minutes, Mr. Michael Barber from the Sacramento County District Attorney's Office. Mike.

Mr. EDWARDS. We are glad to have you here. You both can sit at the witness table. And I believe we are going to hear from Mr. Hays first, and immediately thereafter we will hear from Mr. Barber and we will question you as a panel. You may proceed.

[The complete statement of Mr. Hays follows:]

STATEMENT BY LOUIS B. HAYS, DEPUTY DIRECTOR, OFFICE OF CHILD SUPPORT ENFORCEMENT

Mr. Chairman, Members of the Subcommittee on Civil and Constitutional Rights, I appreciate the opportunity to be here this morning to provide the Administration's views on H.R. 3491 and H.R. 3492, wbich except from discharge in bankruptcy, child support obligations assigned to a State as required by provisions in the Social Security Act relating to the Aid to Families with Dependent Children (AFDC) program.

The Administration supports the intent of both of these biiis which would have a direct and positive impact on the Department of Health, Education, and Welfare's Child Support Enforcement Program. To adequately describe that impact, I would like to take a few minutes to discuss the Child Support Enforcement Program and the principies upon which it is based.

The Child Support Enforcement Program is a Federal/State effort to locate absent parents, to estabiish paternity of the children, and to ensure that absent parents provide support payments for their chiidren. In performing these functions, the Child Support Enforcement Program clearly recognizes and applies the principle that every child has a right to support from two parents. Unfortunately, in a surprising number of cases this moral and legal obligation is not being met. The taxpayer is asked to shoulder the burden of providing basie support for these children.

The vast majority (80 percent) of familiies receiving Aid to Families with Dependent Children (AFDC) are eligible to receive assistance because the absence of one of the parents from the home—in most cases the father—has increased the likelihood that the family will be left in a state of poverty. Many of these absent parents are capabie of contributing to the support of their children but do not. This is wrong. The AFDC program was not created to absolve parents of their responsibilities to care for their chiidren. It was clearly not the intent of the law for the American people to subsidize parents who have the ability to support their own chiidren.

Under current law, absent parents can discharge their child support debts by declaring bankruptcy. Discharging deiinquent child support payments allows absent parents to avoid financial responsibility for their children and may result in the taxpayer supporting these children through thc AFDC program. The AFDC law, which requires applicants for welfarc to agree to assign child support payments to the State, was intended to deal with just this problem.

One of the provisions of the original child support enforcement legislation, as enacted by Congress in 1974, prohibited parents from evading their child support obligations by declaring bankruptcy. Section 328 of Public Law 95–598 repealed this provision for AFDC families; H.R. 3492 in effect would reinstate it.

We do wish to point out that the relevant section of the U.S. Code, as it would be amended by H.R. 3491, does not specifically refer to those instances in which there has been a court order for child support apart from divorce, separation, or property settiement agreements. We recommend those support orders be included and would be glad to work with the Subcommittee to modify the bill.

About $1.6 biiion is chiid support arrearages is currently outstanding. If this provision is not reinstated, we estimate that as much as $48 million in child support obligations could be discharged in bankruptcy in fiscal year 1980. Of this amount, $19 miiion represents a ioss to the Federal Government, the remaining $29 miiion to State and local governments.

In summary, the Administration supports the intent of H.R. 3491 and H.R. 3492. They will not only save tax dollars, but will, more importantly, benefit the individual children who need their absent parents' financiai support.

Thank you for this opportunity to present our views.

TESTIMONY OF LOUIS B. HAYS, DEPUTY DIRECTOR, OFFICE OF CHILD SUPPORT ENFORCEMENT, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Mr. HAYS. Thank you, Mr. Chairman, members of the subcommittee. I appreciate the opportunity to be here this morning to provide the administration's views on H.R. 4391 and H.R. 3492, which except from discharge in bankruptcy child support obligations assigned to a state, as required by provisions in the Social Security Act relating to aid to families with dependent children program.

The administration supports the intent of both of these bills, which would habe a direct and positive impact on the Department of Health, Education, and Welfare's child support enforcement program.

To adequately describe that impact, I would like to take a few minutes to discuss the child support enforcement program and the principles upon which it is based.

The child support enforcement program is a Federal/State effort to locate absent parents, to establish paternity of the children, and to ensure that absent parents provide support payments for their children. In performing these functions, the child support enforcement program clearly recognizes and applies the principle that every child has a right to support from two parents.

Unfortunately, in a surprising number of cases this moral and legal obligation is not being met. The taxpayer is asked to provide basic support for these children.

The vast majority, 80 percent, of families receiving aid to families with dependent children are eligible to receive assistance because the absence of one of the parents from the home—in most cases the father—has increased the likelihood that the family will be left in a state of poverty.

Many of these absent parents are capable of contributing to the support of their children but do not. This is wrong. The AFDC program was not created to absolve parents of their responsibilities to care for their children. It was clearly not the intent of the law for the American people to subsidise parents who have the ability to support their own children.

Under current law, absent parents can discharge their child support debts by declaring bankruptcy. Discharging delinquent child support payments allows absent parents to avoid financial responsibility for their children and may result in the taxpayer supporting these children through AFDC programs. The AFDC law, which requires applicants for welfare to agree to assign child support payments to the State, was intended to deal with just this problem.

One of the provisions of the original child support enforcement legislation, as enacted by Congress in 1974, prohibited parents from evading their child support obligations by declaring bankruptcy. Section 328 of Public Law 95–598 repealed this provision for AFDC families. H.R. 3492, in effect, would reinstate it.

We do wish to point out that the relevant section of the U.S. Code as it would be amended by H.R. 3491, does not specifically refer to those instances in which there has been a court order for child support apart from divorce, separation, or property settlement agreements. We recommend those support orders be included and would be glad to work with the subcommittee to modify the bill.

About $1.6 billion in child support arrearages is currently outstanding. If this provision is not reinstated, we estimate that as much as $48 million in child support obligations would be discharged in bankruptcy in fiscal year 1980. Of this amount, $19 million represents a loss to the Federal Government, the remaining $29 million to State and local governments.

In summary, the administration supports the intent of H.R. 3491 and H.R. 3492. They will not only save tax dollars, but will, more importantly benefit the individual children who need their absent parents' financial support.

Thank you for this opportunity to present our views.

Mr. EDWARDS. Thank you, Mr. Hays. That is a very concise, sensible statement. And now, Mr. Barber, you may proceed.

TESTIMONY OF MICHAEL BARBER, SUPERVISING DEPUTY DISTRICT ATTORNEY, DOMESTIC RELATIONS, SACRAMENTO COUNTY, SACRAMENTO, CALIF.

Mr. BARBER. Thank you, Mr. Chairman. I would like to begin by thanking the chairman and members of the subcommittee and particularly Mr. Matsui for taking up this problem and taking care of it as quickly as they have. We are faced with the situation where effective next October, unless this problem is acted on promptly by this subcommittee and the Congress, as a whole we will be facing precisely the problems that Mr. Hays has referred to, the problems that I am going to allude to in my remarks.

In submitting this testimony, I am speaking on behalf of the Family Support Council, the arm of the California District Attorneys Association concerned with enforcement of support obligations, and on behalf of the office of the Sacramento County District Attorney.

I might offer this addition to Mr. Hays' testimony at this point. The child support program is not only a State, but a local responsibility. It has actively involved numerous local district attorneys throughout the country and particularly in California, thus the cooperation is extended to local county level of government.

The two bills before this subcommittee, sponsored by Congressman Matsui, will correct what we believe was an oversight in the Bankruptcy Reform Act of 1978, Public Law 95–598. Previous to that statute, child support and alimony installments were not dischargeable in bankruptcy, even though they were assigned third persons.

This was pointed out in an article by Professor Loiseaux, which is referred to in my written remarks. Their obligations originate from a statutory base and are not based on contract. Therefore, they had traditionally not been considered similar to the bargained-for debts at which bankruptcy was aimed.

The courts, and later Congress in 1903, recognized that to permit such a discharge would permit the Bankruptcy Act to be used as a loophole to evade an obligation imposed by law. These early decisions recognized that if private family support were not available, the public would have to bear the cost.

With the advent of AFDC, this public burden has become institutionalized. Because the statutory duty of support was created with the protection of the public as its underlying basis, the majority of

courts had no problem in recognizing that public entities who provided support were subrogated to the same protections against bankruptcy that inured to the family.

As Mr. Hays has stated, that majority position was in fact added to Public Law 93–647 in the form of 42 U.S.C. 656(b). But unfortunately that was repealled in the last session.

If these bills before you, plugging this loophole, are not passed, the public and the welfare population alike will be injured. Based on our collections for welfare reinbursement from cases no longer receiving public assistance, which average $250,000 per year, and our total collections on active welfare cases, which exceed $4 million per year, it is not hard to anticipate that $500,000 per year in collections would be tied up in bankruptcy court, just in Sacramento county alone.

And all of this is public money. This is not to say that some of this might not be recouped at the end of the proceeding, but the question must be asked, why should the public sacrifice this reimbursement at all? Further, why should it be put to the burden of litigating such claims in bankruptcy court, raising the administrative costs of this program?

It should be pointed out that the garnishment of funds of individuals who have fled the State of residence of the custodial parent has become an effective remedy in taking the profit out of flight.

Such garnishment protects the jurisdiction of the State court that originally heard the matter, since that court alone retains jurisdiction to resolve disputes concerning this enforcement process.

The intervention of the bankruptcy judge at the place of residence of the fleeing parent places a difficult financial burden on the jurisdiction that has already had to bear the cost of support while that parent was being tracked down. Thus meeting the challenge of Public Law 95–598 in bankruptcy court will be needlessly costly to the public.

The impact of the Bankruptcy Reform Act might be avoided, but in so doing the public would be injured, the custodial parent would be placed in a difficult position and in some circumstances the absent parent might be placed in a more difficult position. The first method would be to eliminate the assignment of support rights and make all sums payable to the custodial parent. If this were done, this would cause the welfare grant to fluctuate dramatically from month to month depending on whether and how much the absent parent paid.

Title IV–D of the Social Security Act has in many jurisdictions guaranteed that welfare grants would be reasonably reliable in amount and minimize the burden on the welfare family in protecting its right to support. Dropping the assignment would reintroduce this uncertainty and measurably increase the cost of enforcement of support both to the public and the welfare family.

The elimination of the assignment would also eliminate the intervention of a court trustee in the support process. Divorces occur for a reason, and one of these reasons all too often, is domestic violence. Payment through a court trustee cuts down the possibility for such domestic violence recurring.

But, without the concept of an assignment, there is little practical need for such a structure. Its dismantling would leave the welfare family open to the kinds of abuse that could well have prompted the divorce in the first place.

A second method of avoiding the consequences of existing law would be to immediately increase the support payments due in the future to an amount equal to all the excess resources of the absent parent, as soon as that person is located.

At present, it is common practice on locating an absent parent, not to disturb any existing support order, rather, the collecting agency attempts to get the sum due each month and an orderly payment on any delinquency under that order.

If the enforcement agency knew that as soon as it attempted to collect these delinquent sums the bankruptcy court would be brought into the picture, then the prudent course of action would be to ignore the past due sums and immediately ask the State court to raise the child support to the highest level possible.

This would raise the administrative cost of the program by burdening the support enforcement agency with heretofore needless court appearances, and would create an additional burden for the judiciary of the State courts.

This would also work to the fiscal injury of the absent parent, since that parent would be deprived of the resources to pay off past due support. And since presumably they would be unassigned, would leave that parent still liable for all the past due support after the custodial parent and child leave the welfare roles.

It should also be noted that the absent parent would also be burdened with the added legal cost of defending against the motion to modify the support upward.

Over and above the consequences outlined above, there are several legal questions left unanswered by the Bankruptcy Reform Act and these could result in continuing litigation and needless public and private legal expense.

The first is defining what is meant by an assignment. All delinquent support payments under title IV–D are assigned for collection to the public at the time of application for AFDC, but the title passes finally to the public only as AFDC benefits are paid out, and only up to the amount of AFDC paid out.

The remainder of the assigned sums remains the property of the welfare family and as collected is to be distributed to that family. If the concept of assignment in Public Law 95–598 is interpreted to include all assigned sums, then the welfare family will also lose its share therein.

If it does not include all assigned sums, and the family remains on welfare during the bankruptcy proceeding, then the question must be asked, How much of the assigned sum is discharged in bankruptcy at that day of discharge? Can bankruptcy operate in the future to discharge sums against which the public secures a lien after the bankruptcy proceeding has been terminated? Another question, the second general question involves defining when the jurisdiction of the bankruptcy court is invoked. More specifically, does it apply to support installments that accrue and go unpaid during the pendency of the proceeding?

If so the absent parent has been handed a strong incentive to immediately declare bankruptcy when the family goes on AFDC, paying

nothing during the interim and delaying the discharging bankruptcy as long as possible, since such a practice would relieve that parent of a considerable part of the cost of a family that apparently was not of much concern to him or her anyhow.

The third question involves the viability of enforcing current support during the pendency of the bankruptcy. As the law stood prior to Public Law 95–598, the enforcement agency could apply for relief from any restraining order and go forward.

Thus interference in State court process was minimal. Now since some or all of the support due may be discharged by bankruptcy court, the court must restrain the State court, interfering in local criminal and contempt process, as well as criminal enforcement remedies.

In summary, let me return to my initial point. Support obligations are not analagous to VISA or Mastercharge bills. They are not bargained-for obligations. They are imposed by law to protect the public, the same as taxes.

To permit them to be eliminated by one who negligently orpeliberately exceeds their credit limits, for their own gratification, is to virtually invite a fraud on the public. To eliminate this fraud, as well as keep down the costs of welfare, welfare administration, the cost of litigation and to adequately protect the privacy and in some cases the property of welfare recipients, it is recommended that H.R. 3491 and H.R. 3492 be passed.

Thank you, Mr. Chairman.

[The complete statement follows:]

DISTRICT ATTORNEY,
SACRAMENTO COUNTY DOMESTIC RELATIONS,
Sacramento, Calif., June 11, 1979.

Re H.R. 3491 and H.R. 3492.

Hon. DON EDWARDS,
Chairman, Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN EDWARDS: This letter is submitted in conjunction with my testimony in support of the two proposed statutes referred to above. In submitting this letter and testimony I am speaking on behalf of the Family Support Council, the arm of the California District Attorneys' Association concerned with enforcement of support obligations, and on behalf of the office of the Sacramento County District Attorney.

The two bills before this subcommittee, sponsored by Congressman Matsui, will correct what we believe was an oversight in the Bankruptcy Reform Act of 1978, Public Law 95–598. Previous to that statute child support and alimony installments were not dischargeable in bankruptcy. As was pointed out in Professor Loiseaux's 1962 article on "Domestic Obligations in Bankruptcy" in the North Carolina Law Rewiew (Vol. 41, No. 1, Fall 1962, p. 27), child support orders, like taxes and punitive damages, originate from a statutory base, not based on contract. Therefore, they have traditionally not been considered similar to the bargained for debts at which bankruptcy was aimed. The courts, and later Congress in 1903, recognized that to permit such discharge would permit the bankruptcy act to be used as a loophole to evade an obligation imposed by law. These early decisions, according to Loiseaux, recognized that if private family support were not available, the public would have to bear the cost. With the advent of A.F.D.C. this public burden became institutionalized. Because the statutory duty of support was created with the protection of the public as its underlying basis, the majority of courts had no problem in recognizing that

public entities who provided support were subrogated to the same protections against bankruptcy that inured to the family. The recent case of *Williams* vs. *Dept. of Social and Health Services*, 529 F. 2d 1264, is representative of this legal reasoning and is in fact the only circuit court of appeals ruling on this subject. Because of some U.S. District Court cases to the contrary, the child support enforcement program incorporated an express statutory protection against such discharge (42 U.S.C. 656(b)). Public Law 95–598 immediately repealed 42 U.S.C. 656(b) and, effective October, 1979, expressly made support rights assigned by the beneficiary of such rights dischargeable in bankruptcy.

If these bills now before you, plugging this loophole, are not passed, the public and the welfare population alike will be injured. Based on our collections for welfare reimbursement from cases no longer receiving public assistance, which average $250,000 per year, and our total collections on active welfare cases, which exceed $4,000,000 per year, it is not hard to anticipate that $500,000 per year in collections would be tied up in bankruptcy court, just in Sacramento County alone. All of this is public money. This is not to say that some of this might not be recouped at the end of the proceeding, but the question must be asked, why should the public sacrifice this reimbursement at all? Further, why should it be put to the burden of litigating such claims in bankruptcy court, raising the administrative cost of this program? It should be pointed out that garnishment of funds of individuals who have fled the state of residence of the custodial parent has become an effective remedy in taking the profit out of flight. Such garnishment protects the jurisdiction of the state court that orginally heard the matter, since that court alone retains jurisdiction to resolve disputes concerning this enforcement process. The intervention of the bankruptcy judge at the place of residence of the fleeing parent places a difficult financial burden on the jurisdiction that has already had to bear the cost of support while that parent was being tracked down. Thus meeting the challenge of Public Law 95–598 in bankruptcy court will be needlessly costly to the public.

There are methods by which Public Law 95–598 might be avoided, but these work to the injury of the public, the custodial parent and even, in some circumstances, the absent parent.

The first method would be to eliminate the assignment of support rights and make all such sums payable to the custodial parent. However, if this were done the welfare grant would fluctuate dramatically from month to month depending on whether and how much the absent parent paid. Title IV–D of the Social Security Act has in many jurisdictions guaranteed that welfare grants would be reasonably reliable in amount and minimize the burden on the welfare family in protecting its right to support. Dropping the assignment would reintroduce this uncertainty and measurably increase the cost of enforcement of support both to the public and the welfare family.

The elimination of the assignment would also eliminate the intervention of a court trustee in the support process. Divorces occur for a reason, and one of these reasons all too often is domestic violence. Payment through a court trustee cuts down the possibility for such domestic violence recurring. But, without the concept of an assignment, there is little practical need for such a structure. Its dismantling would leave the welfare family open to the kinds of abuse that could well have prompted the divorce in the first place.

A second method of avoiding the consequences of Public Law 95–598 would be to immediately increase the support payments due in the future to an amount equal to all the excess resources of the absent parent, as soon as that person is located. At present it is common practice on locating an absent parent, not to disturb any existing support order, rather, the collecting agency attempts to get the sum due each month (current support) and an orderly payment on any delinquency under that order. If, however, the enforcement agency knew that as soon as it attempted to collect these delinquent sums the bankruptcy court would be brought into the picture, then the prudent course of action would be to ignore the past due sums and immediately ask the state court to raise the current support to the highest level possible. This would raise the administrative cost of the program by burdening the support enforcement agency with heretofore needless court appearances, and would create an additional burden for the judiciary of the state courts.

This would also work to the fiscal injury of the absent parent since that parent would be deprived of the resources to pay off past due support, and since presumably they would be unassigned, would leave that parent still liable for all the past

due support after the custodial parent and child leave the welfare rolls. It should also be noted that the absent parent would also be burdened with the added legal cost of defending against the motion to modify the support upward.

Over and above the consequences outlined above, there are several legal questions left unanswered by Public Law 95–598 that could result in continuing litigation and needless public and private legal expense.

The first is defining what is meant by an assignment under Public Law 95–598. Under Title IV-D, while all delinquent support payments are assigned for collection to the public at the time of application for A.F.D.C., title passes finally to the public only as A.F.D.C. benefits are paid out, and only up to the amount of A.F.D.C. paid out. The remainder of the assigned sums remains the property of the welfare family and as collected is to be distributed to that family (45 C.F.R. 302.51). If the concept of assignment in Public Law 95–598 is interpreted to include all assigned sums, then the welfare family will also lose its share therein. If it does not include all assigned sums and the family remains on welfare during the bankruptcy proceeding, then the question must be asked, how much of the assigned sum is discharged in bankryptcy at that date of discharge? Can bankruptcy operate in the future to discharge sums against which the public secures a lien after the bankruptcy proceeding has been terminated?

The second involves defining when the jurisdiction of the bankruptcy court is involed. More specifically, does it apply to support installments that accrue and go unpaid during the pendency of the proceeding? If so, then the absent parent has been handed a strong incentive to immediately declare bankruptcy when the family goes on A.F.D.C., to pay nothing during the interim, and to delay the discharge in bankruptcy as long as possible since such a practice would relieve that parent of a considerable part of the cost of a family that apparently was not of much concern to him or her anyhow.

The third question involves the viability of enforcing current support during the pendency of the bankruptcy. As the law stood prior to Public Law 95–598, the enforcement agency could apply for relief from any restraining order and go forward. Thus the interference in state court process was minmal. Now, since some or all the support due may be discharged by the bankrputcy court, the court must restrain the state court, interfering in local criminal and contempt process, as well as civil enforcement remedies.

Researching and, if necessary, litigating these issues will be at public expense. That is, it will be unless H.R. 3491 and H.R. 3492 are passed by you.

In summary, let me return to my initial point. Support obligations are not analogous to "VISA" or "MASTERCHARGE" bills. They are not bargained for obligations. They are imposed by law to protect the public, the same as taxes. To permit them to be eliminated by one who negligently or deliberately exceeds their credit limits, for their own gratification, is to virtually invite a fraud on the public. To eliminate this fraud, as well as keep down the cost of welfare, welfare administration, the cost of litigation, and to adequately protect the privacy and in some cases the property of welfare recipients, it is recommended that H.R. 3491 and H.R. 3492 be passed.

Very truly yours,

MICHAEL E. BARBER,
Legislative Representative, Family Support Council.

Mr. EDWARDS. Thank you, Mr. Barber. Before we proceed with the questioning, it is my pleasure to introduce a new staff counsel, Mr. Charles Vihon, who comes to us with an excellent background in bankruptcy.

Mr. EDWARDS. The gentleman from California, Mr. Matsui, is recognized.

Mr. MATSUI. Thank you, Mr. Chairman, At this particular time I don't have any questions. I think, Mr. Chairman, perhaps other Members might.

Mr. EDWARDS. Thank you, Mr. Matsui. Mr. Sensenbrenner?

Mr. SENSENBRENNER. I have no questions, Mr. Chairman.

Mr. EDWARDS. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. I want to commend our colleague, Mr. Matsui, for filing this particular legislation. I would ask him and also the witness about one point: Could this be drawn too broadly? It includes alimony, and as I recall, our philosophy in bankruptcy is that we should put all claims more or less on the same footing. Our philosophy was that we should not prefer claims.

Now, if we include alimony in this proposal, could we conceive of a situation where the husband and the wife make an arrangement whereby he has to pay $10,000 a year, let's say, in alimony, or that they agree to a lump-sum settlement and that that is not dischargeable in bankruptcy. And the credit is lost because they have made an arrangement for a rather substantial alimony. Would the witness or Mr. Matsui like to answer.

Mr. HAYS. Alimony is not specifically part of the child enforcement program bill.

Mr. DRINAN. But it is in the bill.

Mr. HAYS. Yes, sir; as I understand it, alimony is a very important resource in the aid to families with dependent children program. So while we have not specifically addressed our comments to the subject of alimony, only to child support, I would think that it would hurt the aid to families with dependent children program if alimony were excluded from the exception to discharge in bankruptcy.

Mr. BARBER. May I also respond?

Mr. DRINAN. Yes.

Mr. BARBER. Under the *Lester* decision, which I am sure you are familiar with, the decision that would permit family obligations, even though in part they appear to be child support obligations to a State court, allow to be deducted as alimony for tax purposes, there is a continuing and increasing practice among domestic relations attorneys, family law attorneys, to simply state child support in a more general term, allowing a greater tax benefit to inure to the absent parent. Consequently, if in fact alimony were stricken from this bill. because people are trying to take advantage of the *Lester* decision, we might be stuck with the same problem we are now confronted with.

And it further should be recognized that the only circumstances under which discharge would be permitted in the Bankruptcy Reform Act is in relation to assigned sums. Thus, alimony is not now dischargeable, if in fact it is payable directly to the former spouse.

Mr. DRINAN. Through the court, you mean?

Mr. BARBER. Or outside of the court, it's not dischargeable, if it is payable to the former spouse, whether through the court trustee or not. But if it is assigned to the public, then it becomes dischargeable. Consequently, the problem that you're referring to in relation to creditors already exists in law.

Mr. DRINAN. I wonder if the witness or Mr. Matsui is aware of any resistance to this bill among bankruptcy lawyers or bankruptcy theorists?

Mr. MATSUI. Mr. Chairman—Mr. Drinan, I don't know if anyone who is knowledgeable in bankruptcy law itself is opposed to this bill, but I do know there are some poverty lawyers who are opposed to the bill on the ground that the purpose of bankruptcy law is to give people a new start and this bill, in essence, would not discharge certain obligations.

So those people would be opposed to this legislation. I understand, though, that Mr. Breen had been in contact with one gentleman who may submit some documents to the record in reference to the original question you asked, Mr. Drinan. The alimony part of the legislation was inserted in there mainly because of the negotiation that goes on that Mr. Barber and Mr. Hays referred to regarding tax treatment.

So, oftentimes, lawyers will not think about the fact that the spouse may one day file bankruptcy and when they do they negotiate in terms of tax treatments and alimony and child support may be juggled, so to speak, in order to give both sides adequate tax advantage. For that reason we want to make sure there is some protection.

Mr. DRINAN. One last question. Would you describe the process by which you arrived at the figure—a figure cited in the other documents that we have heard from Mr. Louis Hays, if this provision is not reinstated, as much as $48 million in child support obligations could be discharged in bankruptcy in fiscal year 1980? The $19 million represents a loss to the Federal Government, the remaining $29 million to State and local governments.

Mr. HAYS. That figure, Mr. Drinan, is based upon our calculations of the amount of outstanding child support arrearages as of fiscal year 1980, which is approximately $1.6 billion dollars.

Now—based upon our analysis of the program—we have assumed that approximately 30 percent of those arrearages would be collectible under the child support program.

Then if we make what we feel is a very conservative estimate, that 10 percent of the delinquent absent parents would take advantage of the exception to the discharge in bankruptcy, or rather the lack of exception, the resulting amount of child support loss would be $48 million. And the reason that it breaks out between $19 million to the Federal Government and $29 million to the State and local government is because that is the way in which the money has to be shared between Federal and State governments under the AFDC and child support programs.

Mr. DRINAN. How would you respond to the contention of the poverty lawyers that even the poor, especially the poor, deserve a fresh start in bankruptcy and that's the whole architecture of the bankruptcy law that gives people a new opening in their lives?

Mr. HAYS. I would respond by stating that that so-called right to a fresh start would have to be balanced against what I would view as a greater right of the children to receive the support of parents, and also the right of society as a whole, not to have to substitute the parents' support obligations through the AFDC program.

Mr. BARBER. May I further respond?

Mr. DRINAN. Yes.

Mr. BARBER. First of all, in bankruptcy, in the law there is property that is exempt from consideration in bankruptcy. This means that the person who goes through bankruptcy in fact is left in a somewhat better position than if he were truely starting with a fresh start, after he left bankruptcy court, because a true fresh start would leave him with nothing but the barrel, if they considered everything that he owned in court. So there is property that is not considered in terms of applying it to his debts right now.

The social policy and the balancing of competing interests is already taken into consideration in bankruptcy law in giving the debtor special consideration. Thus exempting certain obligations from discharge would not change this underlying philosophy of the law.

Second, the individual that we're considering is not necessarily going to fall within the concept of poverty, since generally you find an individual who is truly poor, quite probably will win his case and prevent any substantial obligation being imposed on him or her. I say him because 99 percent of our cases usually involve an absent father, between 95 and 99. But the individual we're discussing quite probably would be able to secure credit, even though without substantial resources, because he has a paycheck out of which he or she must also make support.

So it is not necessarily a situation that involves those who are truly poor, but those who are seeking a way out of a statutorily imposed obligation primarily for their own gratification.

Mr. DRINAN. All right, I thank you, and yield back to counsel my time.

Mr. EDWARDS. Well, we're going to have other statements on this matter, and we will have poverty lawyers, too, because it is a very important point that my colleagues from California and Massachusetts make.

You witnesses are saying that the governments, State and Federal goveinments, are entitled to this money when other creditors, small businesses, Ma and Pa grocery stores, are being wiped out. And you do—and you have good reasons, but there must be something on the other side.

You're talking probably about very poor wage earners here, with unfortunate family situations who don't want to go into bankruptcy court and be declared bankrupt. And how do you respond to that?

The whole purpose is, as my colleagues point out, the bankruptcy law is to let people get a decent fresh start in life, and not to have the government or anybody else hanging over their heads, as their creditors, so they can live a halfway decent life.

Mr. HAYS. Mr. Chairman, I would like to observe that for those absent parents who truly fall into that poverty category, those individuals are, in most instances, not going to be asked to meet that child support obligation in the first place.

If they have accumulated arrearages, it is because they lack the financial resources to pay. It's unlikely that those individuals are in fact going to be called upon to meet those arrearages, simply because you can't get blood out of a turnip, if they don't have resources. We are more concerned about the more affluent individual who could, through various procedures available to him, discharge in bankruptcy the child support debt, even though he might, in fact, have the resources to meet it.

So we are less concerned with the true poverty person. We are more concerned with the financially able absent parent.

Mr. EDWARDS. Well, what about the child, the dependent? Is he or she doing worse or better because of these obligations? What about small, poor counties, where in these parts of the country they might be better off financially if these laws are enacted? Will the children then be discriminated against? Do you follow me?

Mr. HAYS. I'm not sure, Mr. Chairman.

Mr. EDWARDS. Well, why is the child better off under your proposal?

Mr. HAYS. We feel it is to the advantage of the child to pursue the absent parent and enforce that absent parent's child support obligations, also to establish the legal paternity of the child in those cases where the child is born out of wedlock, because that secures some very important legal rights for the child who was born out of wedlock. And furthermore, it gives that child the opportunity, depending on the amount of child support payments from the absent parents, attain financial independence, so to speak, and not to have to rely on the public assistance program for the sole source of support.

We feel it is definitely to the advantage of the child.

Mr. MATSUI. Will the chairman yield?

Mr. EDWARDS. Yes.

Mr. MATSUI. Perhaps I can ask Mr. Barber a question to help answer the chairman's question.

How will the child benefit by Public Law 95–598 in the event this legislation does not pass? Is the law such that child support payments will become dischargeable, Mr. Barber? Do you foresee a possibility, a reasonable possibility, that the State of California and neighboring counties in California would then stop accepting assignments from employers or the custodial parent and then have the custodial parent themselves attempt to collect the money through their own means? And, in the county of Sacramento and other counties, would absent parents then make payments at a very minimal level, which they did prior to the assignment program coming into effect?

Mr. BARBER. Yes, sir. That is certainly one consideration. The concept that is now embodied in law is a concept that protects the welfare applicant because as I pointed out in my testimony earlier, the concept of an assignment in effect it creates a trusteeship in the public that insulates the poor family from possible abuse from the absent parent.

Furthermore, it gives the welfare family a steady grant. In some counties in California, and in some States, the concept of the welfare grant fluctuated widely from month to month is prior to the institution of the IV–D program.

This prior practice I am about to describe was to protect the public. Based on a projection of received or potential private support coming from the absent parent the welfare grant was limited. This, in turn, resulted in a scramble at the end of the month by the welfare people to get that grant supplemented when the support was not forthcoming. Such a scramble, also involved considerable paperwork and bureaucratic time lost in terms of decisionmaking, and hardship by the welfare family and virtually invited fraud on the part of the welfare family since it was much easier for the welfare family in the end to say the money wasn't going to come in, or allege that the absent parent had disappeared and take what it could under the table.

A regular flow of welfare funds in fact protect the poor and relieves them of a certain amount of anxiety. To destroy the concept of the trustee that necessarily flows from the assignment would in fact injure the welfare family. This would be particularly true in those poorer counties that you referred to, Mr. Chairman, since those counties are going to be most stringent in trying to regulate the amount of welfare funds that flow to these families.

Mr. EDWARDS. Well, that is very helpful. The Chair would like to announce that he is not going to attend the quorum call that is now going on, but the members may do as they feel best. We will continue with the hearings.

Mr. DRINAN. What is the letter of history on this matter? Is there anything in our records precisely about this question or did we just simply settle the question on the principle that I enumerated earlier, that everybody should be equal?

Mr. VIHON. Mr. Drinan, the legislative history does refer to the distinction made between recipients of the obligation, the holder of the obligation; that is, that dischargeability is going to be contingent upon whether the obligation is in the hands of the original beneficiary or an assignee and it was the Congress feeling that dischargeability should be provided for only when the obligation was held by the intended primary beneficiary, and if there was an assignment that it should preclude the obligation from being nondischargeable, Otherwise, that it should be discharged.

I might indicate that the language of the history does not indicate any distinction between types of assignees. In other words, it apparently was the feeling of the Congress at the time there was no distinction between any of the assignments, after the obligation had been assigned.

Obviously, the witnesses today have presented to us one approach of assignees that—when such an assignment occurs, the matter of dischargeability ought not to change, as existing Public Law 95–598 would provide.

But there was no distinction as between assignees and it was just the reference to the fact of the assignment alone.

Mr. DRINAN. Thank you.

Mr. BOYD. Specifically this portion of the bill came into being after the full committee met on H.R. 8200 in 1977. As you recall, it was reported on by the full committee on September 8. And Congress at that time, the membership decided or looked at the dischargeability sections as related to the Social Security Act, and determined, with the committee, that the societal cost and the governmental cost of acquiring these debts outweighed that which the Government would get in return and that was consistent with the fresh start philosophy which was adopted by the subcommittee and adopted by the committee during mark up in the previous March.

That was after the bill was reported in September 8, and what was included in the Senate bill. It was later compromised between the committees in September of 1978.

Mr. DRINAN. What precisely was compromised? What is the precise point?

Mr. BOYD. The House language was retained. The Senate did not address the issue. The House language providing for the exception for discharge and support payments was retained, based on the philosophy that the governmental cost of securing payment from judgment-free debtors exceeded that which the Government would return and the potential, political reasons for cleaning up the welfare system, if you will, these individuals may be pursued by Government agencies without any real remuneration on the part of the taxpayer.

The taxpayer would pay out a greater sum and that was the rationale for this.

Mr. DRINAN. So in essence we said that even if these sums are correct about the $48 million, that we felt that these people shouldn't be pursued, so to speak, by a State agency, and even if they were, they probably wouldn't be able to recover very much?

Mr. BOYD. That is correct. It is not, of course, insulating the debtor from having to pay, it means that it's not acceptable to discharge.

Mr. DRINAN. I see what you mean. Thank you very much. I thank you, Mr. Chairman, for yielding.

Mr. MATSUI. Mr. Chairman? May I pursue Father Drinan's questions? I didn't quite understand. Is there any test by either proponents or opponents regarding the dischargeability of child payments once an assignment is made?

Mr. BOYD. No; the language was discovered, as a matter of fact, at the time the bill was before the full committee, that is, the discharge provision in the Social Security Act was discovered. And at that time, the subcommittee was making or endeavoring to collect all references to bankruptcy which were scattered throughout the United States Code and galvanize them into one bankruptcy format; at that time this reference in the Social Security Act was discovered.

So there were no hearings.

Mr. MATSUI. What was the discussion that occurred at the full committee level regarding this matter?

Mr. BOYD. That discussion would have been between members of the subcommittee and staff, which was then Mr. Klee and Mr. Levin.

Mr. MATSUI. Thank you.

Mr. EDWARDS. I believe there was a reference made by one witness, is that correct?

Mr. VIHON. A gentleman from Massachusetts was a witness at one of the hearings and in the—I recall in the course of his testimony he may have had one or two sentences at the very very most that referred to the AFDC provisions with respect to assignment.

Mr. DRINAN. Which gentleman from Massachusetts?

Mr. VIHON. I believe he was a representative from one of the legal services program, but I'm not absolutely sure about it. It wouldn't be very difficult to find.

Mr. EDWARDS. Without objection, we will hold the record open for that reference and include it at this point in the record.

Mr. BOYD. There are references in the in-house report, Father Drinan, to—and I'm not sure whether these are the appropriate references—but there are references to part 2 and part 3 of the subcommittee hearings. And they may be the ones to which majority counsel is referring.

Mr. VIHON. That's it.

Mr. BARBER. May I address myself to some of the corrections that were reviewed in-house in the last session?

In the pracitcal world, the observations that have been made do not hold true. One gentleman in our jurisdiction, for instance, who was unfamiliar with the IV–D exemption from discharge, attempted to take a case before our local bankruptcy court. In that situation the individual who went to court was in fact employed at something like $800 a month.

Only a portion of the total AFDC grant had been assessed against the individual, since we were primarily concerned with taking the

family off of welfare. Thus our claims in fact amounted to only $1,400, although the child had been on aid for some substantial period of time—about 4 years.

In a second case, an individual who was fully employed in Spokane, Wash., after having been garnisheed in California, because that was where their divorce had taken place, attempted to take the case into bankruptcy court in Spokane, Wash. Again, this was a fully employed individual.

Now, because of the Bankruptcy Reform Act, the precise case pending before the bankruptcy court in Grand Rapids, where the individual—and I don't have full the facts, but we can check them out—where the individual again is fully employed, owes $2,900 in back child support and is in a position where it certainly would be worthwhile to pursue the support obligation.

In the case in our jurisdiction, we did collect the whole sum.

The second point in terms of enforcement and cost of enforcement the focus has been shifted by the bankruptcy law as it now stands. Now, instead of going after support, attempting to work out an arrangement, where over a long period of time the sum will probably be paid back, assuming these are low-income individuals, as we would prior to Public Law 95–598.

We must now go into bankruptcy court and fight it with our creditors. Consequently, if the objective was to save the public money in terms of administration of the program, that objective is not going to be fulfilled by the present law, and as I pointed out in my testimony, in fact the administration will be increased by motions to modify future support upward and the like.

Also, money that is devoted to this, because of the 13 philosophy, a philosophy not confined to California, will be necessarily taken away from development of paternity cases such as Mr. Hays pointed out, to the protection of the collectability of support obligations.

Thus if the intent of the past Congress behind the Bankruptcy Reform Act is to save the public money it is not being fulfilled and it is going to cost the public that much more unless these amendments are passed.

Mr. EDWARDS. You make a very decisive statement. Mr. Vihon?

Mr. VIHON. In response to Congressman Drinan's concern about the inclusion of alimony in the proposed bill, I assume that you are aware of the fact that both alimony and child support payments under present law, section 17(a)(7) of the act, are nondischargeable obligations?

Mr. BARBER. Yes, sir.

Mr. VIHON. I also assume that you know that under the new statute, under 523(a) the bankruptcy court would now be invested with the power to determine whether such obligations are in fact obligations of that nature and not cloaked in the mantle of some other agreement to avoid their nondischargeability?

I would assume you are familiar with that.

Mr. BARBER. I'm really not, but thanks.

Mr. VIHON. I would assume also that you know that under the new statute it will be the bankruptcy court that will make that determination as compared with the situation under existing title XI? The State courts now make that determination.

It would then place within the purview of the bankruptcy court the full responsibility of assuring that these debts remain nondischargeable? You are aware of the change in the philosophy to that extent? I'm asking you, because of the manner in which you responded to the question that the Congressman put to you.

Mr. BARBER. I was not. It is a departure from traditional law in this area. It surprises me. The key Federal case—and this is purely coincidental—is *Barber* v. *Barber*. Federal courts have traditionally stayed away from making determinations about support or second-guessing State courts in terms of what should be paid in relation to alimony or child support obligations.

Mr. VIHON. Well, I didn't mean to suggest that the bankruptcy court is now going to make those substantive determinations. They will be able to invalidate agreements entered into between the spouses where an attempt is made to cloak what would otherwise be child support payments in some form so as to attempt to avoid the nondischargeability provisions. It's only that limited jurisdiction that is in the bankruptcy court.

You referred also in your response to the Congressman's question concerning the effective State procedures insofar as garnishiments and criminal procedures are concerned. The new statute would not affect any criminal actions that would be brought against any individual.

Mr. BARBER. Wouldn't that be a violation of the restraining order if we in fact then began to prosecute an individual for not providing necessities during the period of time covered by the discharge in bankruptcy?

Thus, you are saying, in fact, counsel, is that the present law is contradictory in that it does not give the bankrupt truly a fresh start.

Mr. VIHON. Well, the Congress, in adopting Public Law 95–598, excepted 362(b)(1) from the automatic stay—"commencement or continuation of a criminal action or against the debtor."

In a similar vein, you referred to garnishment procedures. Those, of course, would be stayed.

Mr. BOYD. Mr. Hays, on page 2 of your statement you indicate that 80 percent of families receiving AFDC payments are also eligible to receive from one or more parents, is that correct?

Mr. HAYS. Not always. It is because of that that they are eligible for AFDC.

Mr. BOYD. And you indicate in the second sentence that many of these absent parents are, too, but do not?

Mr. HAYS. Yes.

Mr. BOYD. What percentage?

Mr. HAYS. Well, we would have a conservative estimate of approximately 50 percent. Mr. Barber might have a slightly different view from his experience in Sacramento County, but nationally, 50 percent of all absent parents have the financial ability to support their children.

Mr. BOYD. And how do you base that percentage?

Mr. HAYS. How do we base that?

Mr. BOYD. How do you arrive at that?

Mr. HAYS. From our experience.

Mr. BOYD. On the basis of those which you locate?

Mr. HAYS. On the basis of the collections that are actually being made and the reports that we receive from States throughout the country.

Mr. BOYD. OK. How successful have you been in locating absent parents?

Mr. HAYS. The location aspect of the program has really not been a particular problem. The actual rate in locating absent parents, the percentage of all parents that are located, this varies substantially from State to State or jurisdiction to jurisdiction.

Again, Mr. Barber could address the situation in Sacramento County. One State that comes to mind is the State of Michigan. They have reported to us that they are able to locate in excess of 80 percent of all their absent parents.

Mr. BOYD. Also on page 4 you indicated that there are about $1.6 billion in child support arrearages, currently outstanding?

Mr. HAYS. Yes.

Mr. BOYD. And then you forecast that if this bill is not passed, there will be some $48 million more in child support obligations discharged in bankruptcy?

Mr. HAYS. Yes.

Mr. BOYD. Now, until this bill—that is, Public Law 95–598—passed, these obligations were not dischargeable?

Mr. HAYS. Yes.

Mr. BOYD. During that period of time, I guess, before this $1.6 million backlog built up, is that correct?

Mr. HAYS. It is a continuing arrearage.

Mr. BOYD. Now that figure is 33 times that which you forecast, if this bill is not passed? Why has that $1.6 million not been collected?

Mr. HAYS. I'm not sure that I'm following your question, counsel. Could you amplify your question, perhaps?

Mr. BOYD. One of the bases upon which your argument hinges is the societal and Government cost involved. Mr. Barber argues that the State will have to litigate in bankruptcy court and the cost which will accrue from that endeavor will increase the governmental cost involved in recovering these funds. But your statement indicates that there are $1.6 billion in outstanding payments now?

Mr. HAYS. Right.

Mr. BOYD. What are the reasons why that $1.6 billion has not been collected? I'm sure there are a number of other reasons. I'm wondering if you could provide some of them for us?

Mr. HAYS. Well, there are a number of reasons. One reason is that the child support program under the Federal legislation at least is still a relatively new program. It went into effect in August of 1975. And the vast majority of States prior to that time, in fact, had very little, if any, organized child support program.

So it has been a gradual process to establish effective programs all over the country. Obviously in the meantime, there are child support obligations that have not been complied with regularly on a month-to-month basis. So every month that goes by, every month that a child support obligation is not met on a current basis, there is an arrearage established and that tends necessarily to grow.

Mr. EDWARDS. If counsel will yield, as the witness indicates on page 4, $1.6 billion in child support arrearages has been assigned to the Government.

Mr. HAYS. Yes. The $1.6 billion is that portion that is covered by the assignment provision of the Social Security Act.

Mr. BOYD. Thank you.

Mr. EDWARDS. Are there further questions?

We thank Mr. Matsui for making these excellent witnesses available and Mr. Barber and Mr. Hays, we thank you very much for a most helpful testimony.

Mr. BARBER. Thank you.

Mr. HAYS. Thank you.

[Whereupon, at 10:30 a.m., the hearing was adjourned.]

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